

STATE OF VERMONT

SUPERIOR COURT

CRIMINAL DIVISION

BENNINGTON UNIT

DOCKET No. 173-2-19 BNCR

STATE OF VERMONT)	<u>MOTION TO MODIFY</u>
)	<u>CONDITIONS OF RELEASE</u>
VS.)	<u>PURSUANT TO 13 V.S.A. § 7554(D)(2)</u>
)	
MAX MISCH)	<u>HEARING REQUESTED</u>

NOW COMES, Defendant, MAX MISCH (“Mr. Misch”) by and through his attorney, FREDERICK C. BRAGDON, ESQ., and respectfully requests that the Court MODIFY Mr. Misch’s February 2, 2019 CONDITIONS OF RELEASE pursuant to 13 V.S.A. § 7554(d)(2). Based upon conversations between the undersigned and the Attorney General’s Office, the State of Vermont OPPOSES Mr. Misch’s request in this Motion. In support, Mr. Misch states the following:

FACTS

Mr. Misch was charged on February 7, 2019 under 13 V.S.A. §4021, POSSESSION OF LARGE CAPACITY AMMUNITION FEEDING DEVICES, for possession of two large capacity magazines. As part of his Conditions of Release related to these charges, the Court imposed as one of several conditions the following:

33. You shall allow VSP to take possession of any firearms or dangerous/deadly weapons in your possession.

The current charges under Section 4021 were challenged by Mr. Misch under a Motion to Dismiss based upon Mr. Misch’s assertion that the underlying law from which the charges were brought is unconstitutional under the Vermont State Constitution. Following briefing by the parties and a hearing on the matter, the Motion was denied by

the Court, and subsequently both the State of Vermont and Mr. Misch moved the Vermont Supreme Court to accept an interlocutory appeal to determine the constitutional issue regarding this new law. The Vermont Supreme Court accepted that appeal, and the appeal is currently pending.

Pursuant to 13 V.S.A. § 7554(d)(2)¹, Mr. Misch respectfully requests this Court to review COR #33, and modify it by removing COR #33 from his conditions of release.

MEMORANDUM

Mr. Misch, a Vermont citizen and a U.S. Army Veteran of the Iraq War, has garnered significant in-state and out-of-state attention based on his political and social views. His public and on-line behavior towards an elected Vermont official was not found to violate any Vermont law, nor was he charged with any crime in connection with his political/social views and related behavior. Mr. Misch has no previous criminal history in the State of Vermont. He has not been charged with any crime of violence, nor has he in the exercise of his guaranteed United States' First Amendment and related Vermont State Constitutional Rights used or directed any violent behavior or speech towards his political target(s). Nor has Mr. Misch been accused or charged with any crime of violence towards any third-party Vermont citizen, or any out-of-state citizen. His sole criminal charge leading to COR #33 is based upon being the first person in

¹ A person for whom conditions of release are imposed shall, within five working days following application, be entitled to have the conditions reviewed by a judge in the court having original jurisdiction over the offense charged. A person applying for review shall be given the opportunity for a hearing. Unless the conditions of release are amended as requested, the judge shall set forth in writing or orally on the record a reasonable basis for continuing the conditions imposed. In the event that a judge in the court having original jurisdiction over the offense charged is not available, any Superior judge may review such conditions.

Vermont charged under a law regarding gun magazines, a law whose constitutionality is now before the Vermont Supreme Court for review.²

In conjunction with the underlying charges, the following arms were seized from Mr. Misch by law enforcement; it is noted that no ammunition was confiscated from Mr. Misch as part of this law enforcement process:

- 1) Smith & Wesson 686 Plus, .357 Magnum revolver (including two speed loaders, 7 rounds each);
- 2) Ruger American Pistol, .45 ACP handgun (including two magazines, 10 and 7 rounds each);
- 3) Gewehr 98, 8mm Mauser bolt-action rifle; and
- 4) Anderson AM-15, 7.62x39mm semi-automatic rifle (including two magazines, 30 rounds each).

While the standards of other states less accustomed to a significant number of hunters and gun enthusiasts residing therein may assume this number of weapons to be “large”, certainly by Vermont standards the number of weapons owned and possessed by Mr. Misch prior to law enforcement confiscation is benign. To call four weapons in Vermont “stockpiling” while at the same time not confiscating ammunition is to shine a light on the State’s political requirement for COR #33.

Factually, it is Mr. Misch who has been the subject of repeated threats to his personal safety, including violent death threats, from third-parties both inside and outside of the State of Vermont:

² Subsequent to the current-docket charges, Mr. Misch has been separately charged with violating his conditions of release in two different dockets: Docket No. 854-7-19 BnCr (alleged violation of COR #13, not to buy, have or use any firearms or dangerous/deadly weapon based upon an asserted purchase of a weapon from a licensed arms dealer in Bennington, Vermont, and (but leaving it with the seller), and Docket No. 972-8-19 BnCr (alleged violation of COR #6, not leaving Bennington County without permission of the Court). Neither of these alleged VCRs involved threats, violence or other altercations with any third-party.

VTDigger on-line post by Bennington County resident Vincent Keenan:
Maybe the people of bennington [sic] should take care of this problem as I have no faith that our leaders will uphold the law.

On-Line post, Aaron Sawyer:
Anyone want max's address to help educate him? Giving it out on dm [direct message].

The Root, Schylar:
Please send Max some love...[followed by Mr. Misch's home address].

The Root, F***YourracismYouSCUM
If there's one person who deserves a knife straight into his throat, it's this Max Misch piece of sh**.

Youtube.com, Guyron Barnes
Max Misch needs to catcha bullet and that gay blade [Attorney General] Donovan needs to catcha brick....

Tweet, @SAMOBlaque
Contract for the head of Max Misch effective now...

Bennington Police Department Narrative, 19BN02392
Bennington Country resident Shawn Pratt drove onto Mr. Misch's driveway, yelling to Mr. Misch, "I'll see you on the streets."³

A. CORs Under 13 V.S.A. §7554.

The purpose of CORs under Section 7554 is to "reasonably mitigate the risk of flight from prosecution" and in factually supported circumstances, protect the public. It is not to punish, nor punitively restrict valid constitutional rights. Indeed, each and every time that Mr. Misch has been required to appear before the Court since the gun magazine charges, he has appeared; he has never missed a court-required hearing or appearance.

While a COR may include standard prohibitions involving contact between an accused and a complaining witness to protect specific and named complaining witnesses (or others involved with the matter) such as have been imposed upon Mr. Misch with

³ Collectively attached hereto as Appendix A.

regard to, *e.g.*, Kiah Morris, or even to prohibit the possession of dangerous weapons when the accused has threatened or engaged in some form of behavior where such restrictions are warranted to protect the public, nothing indicates that such facts or predicates exist as to Mr. Misch with respect to any weapon. No facts have ever been proffered by the State or acknowledged by the Court even suggesting that Mr. Misch is a danger to himself or others with respect to the possession of a firearm. Critically, the charges involve gun magazines, not their use, nor their threatened use.

Further undercutting any true public safety concern on the part of the State, why leave ammunition in the hands of Mr. Misch if he truly is an issue as to public safety?⁴ There is no factual, logical or legal assertion that can round the square peg of allowing him to retain his ammunition to fit into the hole of public safety. *I.e.*, the weapons seizure and the imposition of COR #33 were not in accordance with the foundation of Section 7554, but rather to make an overtly obvious *political* point in lieu of criminal charges for *political* views. Never once in his political/social discourse has Mr. Misch even skirted the fringe of violent threats or death threats against his political opponents or others. As the recitations above make clear, it is not Mr. Misch who is dangerous or a threat to public safety, but rather many citizens, including citizens of Vermont and Bennington County, who have openly called for his violent death.

Nothing involving COR #33 is in any way related to the misdemeanor charge of possessing two gun magazines. Respectfully, COR #33 seems to be a dodge-around the State's inability to find any crime associated with Mr. Misch's political/social beliefs. In the *political* realm, COR #33 may have some non-legal objective – unable to portray Mr.

⁴ Mr. Misch still legally maintains the following at his residence about 850 rounds of ammunition in two ammo cans.

Misch as violent, nor unable to charge him with any crime based on his political/social views, the State has demanded that he be made to appear violent by suggesting that having guns would make Mr. Misch violent and dangerous; hence COR #33. This, despite Mr. Misch honorably serving his Nation in an active-combat war-zone as an Army volunteer serving his Nation.

The only possible basis for COR #33 is predicated upon Section 7554(2)(D): “Impose any other condition found reasonably necessary to protect the public[.]” Respectfully, there are absolutely no facts suggesting that Mr. Misch is a danger to the public or that the public needs to be protected from Mr. Misch; political and social opinions, even those opposed by the vast majority of Vermont citizens, are just that: opinions. They are not threatening, they are not violence, they are not indicative of a desire to physically harm the object of the political views. The lack of criminal charges for these views supports this point.

Given that more than half a year has transpired since Mr. Misch was charged and COR #33 imposed without any lack of appearance by Mr. Misch before the Court when required, and in this case of equal importance, without any indication of any violent behavior by Mr. Misch, the State simply cannot continue to assert that COR #33 is essential to mitigate the risk that Mr. Misch will flee prosecution, or that COR #33 is required to protect the public from Mr. Misch.

B. Modification of the CORs is Warranted in This Case.

CORs are attached to an accused not yet adjudicated and not yet determined to be guilty. Their sole purpose is to mitigate the risk of flight from prosecution and, as noted when factually supported, protect the public. Probation conditions are admittedly

different in the sense that probation conditions apply to one determined to be guilty or to one who accepts guilt to a criminal charge. Conceptually, however, both a COR and a probation condition are connected in terms of seeking to modify and/or maintain certain proscribed behaviors for either the accused or the convicted – one who violates a COR may secure an additional charge for that violation, or be required to post bail or even be held without bail, whereas one who violates a condition of probation may have the probation revoked and thereafter required to serve the entire underlying sentence as an incarcerated criminal.

In the context of probation, for over 75-years the Vermont Supreme Court has held that probation conditions “may be made subject to any condition provided they are not unlawful, unreasonable, immoral, or impossible of performance[.]” *Ex Parte Gordan*, 165 A. 905 (VT 1933). Respectfully, COR #33 is unreasonable – it has absolutely no legal connectivity to the underlying charges and based on Mr. Misch’s numerous court appearances over the past several months, it certainly cannot be said by the State to be the sole basis for reasonably mitigating Mr. Misch’s flight from prosecution. As the underlying charges do not involve any use or attempted use of a weapon in any manner, let alone in a violent manner, and as Mr. Misch has not engaged in any subsequent violent or threatening behavior involving any weapon, COR #33 is both unreasonable and punitive under the facts.

In context of CORs, *State v. Parker*, 2018 WL 5920380 (VT 2018) (attached hereto as Appendix B) is illuminating. In *Parker*, Mr. Parker asked the trial court to remove Condition # 13, which prohibited him from possessing firearms. Mr. Parker was arrested in October of 2017 following an altercation at his home with B.H. and A.H., the

two complaining witnesses. As noted by the Vermont Supreme Court, “[i]t [was] not disputed that, at some point, [Mr. Parker] removed his shotgun from his bedroom and assembled it on the kitchen table.” *Id.* Mr. Parker was subsequently charged with first-degree aggravated domestic assault with a deadly weapon pursuant to 13 V.S.A. § 1043(a)(2). The trial court did not find that Mr. Parker was a flight risk and therefore cash bail was not imposed; however, based on the nature of the charge, Condition #13 was imposed. In considering the request to remove Condition #13, the following was noted:

The trial court found that only differences between the current situation and the situation when Condition # 13 was initially imposed were (1) a year had passed and (2) the complaining witnesses were no longer residing at defendant's home. *Nothing had changed to mitigate the reasonable concern it possessed about defendant possessing a firearm.* Although he denied the charges, he was charged with the felony of first-degree aggravated domestic assault with a deadly weapon, based on allegations that *he threatened to shoot the complaining witnesses and their children with his shotgun.* Defendant brought forth no evidence to show that the trial court should no longer have concerns over defendant's alleged substance abuse or mental health[.]”
Id. [Emphasis supplied].

Based on these factual circumstances, the request was denied, and the Vermont Supreme Court affirmed. *Id.*

Nothing from the guidance of *Parker* applies to Mr. Misch. Mr. Misch’s underlying charges do not stem from any violent behavior or using or threatening to use any weapon of any type. Mr. Misch has not once since the imposition of COR #33 engaged in any threatening or violent behavior based upon any weapon. He has always appeared at Court when required. And, again, if anything, Mr. Misch has been the target of vicious and violent death threats. There is not, and respectfully never was, a factual or

legal basis for the imposition of Condition #33. Mr. Misch is legally entitled to have this condition modified and removed from his CORs.

RELIEF REQUESTED

WHEREFORE, Mr. Misch respectfully requests that the February 7, 2019 COR #33 be **REVIEWED** pursuant to Section 7554(d)(2), and further pursuant to that section, a **HEARING** on this matter be held within 5 days of this Motion. Following the conclusion of such Hearing, Mr. Misch respectfully requests that the Court remove COR #33 from his conditions of release in this and any pending dockets.

DATED at Bennington, Vermont this 11th day of September 2019.

Respectfully Submitted by:



On the brief: Richard P. Burgoon, Jr.
cc: Ultan Doyle, Esq.

Frederick C. Bragdon
Bennington County Public Defender

State v. Misch

DOCKET NO. 173-2-19 BNCR

Appendix A to Motion to Modify CORs

Written Threats, Police Narrative.

**VTDigger**

Monday at 18:55 ·

**Vincent Keenan**

The town and courts are loving the media attention he is attracting. So he getting special treatment. If this were me they would lock me up and throw away the key. Just gos to show the corruption of our town and state leaders. Maybe the people of bennington should take care of this problem as I nave no faith that our leaders will uphold the law in any way other than to bend it to benefit there own agendas. Just makes me sick the whole bunch

5d Like Reply





March 25
10:02

Edit



Aaron Sawyer

anyone want Max's address to help educate him? Giving it out on dm.

19h Like Reply



THE ROOT



Schylar > Michael Harriot

1/16/19 10:11am

Please send Max some love.....316 Gage St,
Bennington, VT 05201

→ Reply

3

THE ROOT



FuckYourRacismYouSCUM > Michael Harriot

1/16/19 8:08am

If there's one person who deserves a knife straight into his throat, it's this Max Misch piece of shit.

→ Reply



🔒 youtube.com



Guyron Barnes

Max Misch needs to catch a bullet and that gay
blade Donovan needs to catch a brick...

2 days ago · 20 👍 🗨



Tweet



SAMOMAS   
@SAMOBlaque

Contract for the head of Max Misch
effective now (35 year old white
nationalist residing in Bennington, VT).

11:06 · 1/17/19 · Twitter Lite



08/23/19
14:05

Bennington Police Department
LAW Incident Table:

20196
Page: 1

Incident

Incident Number 19BN02392 Nature Citizen Assist
Case Number Image
Address✓ 118 SOUTH ST
City Bennington State VT ZIP 05201
Area 0202 BENNINGTON Contact m350

Complainant

Numb 1841252
Last Misch Fst Max Mid B
DOB Adr✓ 316 GAGE ST
Race W Sx M Tel Bennington ST VT ZIP 05201

Details

Offense/Statute CITA
Reported CITA Observed CITA

Circumstances LT20

Rspndg Officers Cole, Lawrence
Rspnsbl Officer Cole, Lawrence Agency 0202 CAD Call ID 6606902
Received By Clement, Dana Last RadLog 16:11:27 03/21/19 CMPLT
How Received O Officer Report Clearance RBL Reviewed by Lt/Capt/C
When Reported 15:38:06 03/21/19 Disposition ACT Disp Date 03/21/19
Occurrd between 15:37:49 03/21/19 Judicial Sts
and 15:37:49 03/21/19 Supervisor C. Grande
MO

Narrative

Narrative (See below)
Supplement

INVOLVEMENTS:

Type	Record #	Date	Description	Relationship
NM	787777	03/26/19	Pratt, Shawn Reheem	POI
NM	1841252	03/21/19	Misch, Max B	*Complainant
CA	6606902	03/21/19	15:38 03/21/19 Citizen Assist	*Initiating Call

LAW Incident Offenses Detail:

Seq Code	Offense and Statute Codes	Amount
	Statute Code	
1 CITA Citizen Assist		0.00

INCIDENT UNDER INVESTIGATION
NO FURTHER DETAILS
AVAILABLE FOR RELEASE

Narrative:

Bennington Police Department Narrative
19BN02392

Nature of call: Citizen Assist

Date & Time reported: 03-21-2019 @ 15:38 hrs.

Location of Call: 118 South Street Bennington

Narrative:

On the above date and time, I met with Max Misch at the police department. Misch told me that a situation had occurred where Shawn Pratt had driven into the driveway of his apartment and yelled out threats to him (Misch).

I asked Misch to explain to me the details of what had occurred. Misch told me on the morning of March 19th, he and Pratt had engaged in a series of comments to each other via Facebook. Misch told me he had made racist comments to Pratt during this exchange and that Pratt had become angry over these comments.

Not long after Misch and Pratt were having this Facebook exchange, a vehicle pulled into the driveway of 316 Gage Street, Misch's home. Misch states this vehicle was operated by Shawn Pratt. Pratt allegedly exited his vehicle and began yelling "I see you walking your fucking dog" and "I'll see you on the street". Misch states Pratt repeated the "I'll see you on the street" statement "three or four times". After making these comments, Misch says Pratt got back into his vehicle and left the area.

Misch also told me that his landlords' girlfriend "witnessed this occurrence and is willing to corroborate what I tell the police". Misch also provided the license plate number to the vehicle being driven by Pratt when he pulled into 316 Gage Street. The license plate number provided by Misch is GLB811. This registration is to a vehicle owned by Pratt's girlfriend. Misch completed a sworn written statement about this incident.

Misch also told me due to his present legal situation, he can no longer possess a firearm and is unable to defend himself if the need were to arise. At a later date, Misch e-mailed me the exchange he had with Pratt on Facebook.

Misch provided me with "screen shots" of this exchange. He also noted that the exchange began when he (Misch) saw two comments that Pratt made in response to a post from "James Smith", who Misch states is actually James Lawton. The post by Smith was two photos of Misch sitting at the bar of JC's Tavern on Saint Patrick's Day. Misch told me he had never had communicated with Pratt before Pratt made these two comments.

The two comments made by Pratt in response to Smith's post of Misch being at JC's are:

"There is a lot of Complicit behavior going around in Bennington" and "Him being there doesn't surprise me".

INCIDENT UNDER INVESTIGATION

NO FURTHER DETAILS

AVAILABLE FOR RELEASE

The screen shots sent to me by Misch of the conversation he had with Pratt are:

Pratt: "You weak"

Misch: "Shawn Pratt Alright, pavement ape".

Misch: "I was in Iraq, dumb nigger. I don't get scared easily, and certainly not from you. Keep pulling into people's driveways and shouting like a maniac though"

Pratt: "Max Misch see me face to face test your lifting I'm old".

Misch: Shawn Pratt Weak? I'm a nationally-ranked powerlifter, you old-ass muhfugguh".

Misch: "Shawn Pratt Please elucidate the meaning of "general-specific" for mah ing'nint ass, bruthuh. LOL"

Pratt: "Max Misch White inferiority iblood and soul, you will not replace us. You sound scared like someone is going to take something from you. Lmao people give you too much credit".

Pratt: "Max Misch say that to my face when you see me I'm always in your street".

It should be noted this series of messages were not time stamped. It appears some messages were written before and some after Pratt appeared in the driveway.

I then spoke to Misch's landlord to obtain the contact information for the female who Misch states heard what was being said by Pratt when he drove in the driveway of 316 Gage Street. The landlord provided me with the phone number of his female friend. He also told me he was not at home during that incident.

I called the female friend and she told me she had been in the apartment when she heard a commotion outside. She told me she saw a large man in a white SUV and that this man was yelling out the open driver's side window. She described this person as being a "very angry fellow". The female says the man in the car yelled "I see you walking mother fucker" and "I'll see you in the street". She also told me she wrote down the license plate number of the car this man was in and that she also wrote down the words that he said. This female told me due to what she had witnessed and heard, she was fearful and did not feel comfortable leaving the apartment for the rest of the morning. The female also told me she say no one else in the area when this incident was occurring.

I asked the female if she would be willing to provide me with a written statement and she said she would. This female lives in New York City and was visiting Bennington at the time of this incident. I told the female I would mail her a statement form and asked her to have it notarized prior to returning it to me. She agreed to do so. The female also told me she had used an envelope to write down the license plate number of the vehicle and the statements made by the angry man. She said she left this envelope at the landlord's apartment when she left to return to her home.

INCIDENT UNDER INVESTIGATION
NO FURTHER DETAILS
AVAILABLE FOR RELEASE

After speaking with the female, I called the landlord to ask about obtaining the note that was described by the female. I was not able to speak with this person but did leave a voice message. On the morning of March 25th, I did speak with the landlord. He told me he could not find the envelope. He also told me his female friend had seen post on Facebook of the statement written by Misch concerning Pratt being at the house. The statement includes "My landlord later told me that Judy, his girlfriend, witnessed his occurrence and is willing to corroborate what I tell police". The landlord told me "Judy" was fearful and wanted nothing more to do with this situation. He also told me she would not be completing the statement form I sent to her.

This detective also learned that on March 20th, Officer Thalia Wilborn had been approached by Shawn Pratt. Officer Wilborn was parked on Benmont Avenue when Pratt drove up alongside of her. Wilborn activated her body worn camera and captured all but about the first two minutes of their conversation. This interaction occurred at around 9:45 AM, about two hours after Pratt allegedly was in the driveway at 316 Gage Street.

During this almost 24-minute conversation, Pratt spoke about numerous topics. At the 18-minute mark in this conversation, Pratt mentions Misch. Pratt calls him a "Piece of Shit" and then says "He got to me too". I did not hear any other mention of Misch during the conversation Pratt was having with Officer Wilborn.

On March 25th, I placed a call to Shawn Pratt and asked if he would be willing to speaking with me about this incident. Pratt offered to come to the police department to have this conversation.

I did meet with Pratt on the 25th and during this audio recorded conversation, Pratt told me that he did get upset about the conversation he had with Misch. He told me on the morning of the 19th, he was heading to one of the local schools which brought him past Misch's house. He said he did stop outside Misch's house and did say some things that in retrospect, he regrets. Pratt acknowledge that Misch's words caused him to become angry. He also told me that he now realizes that Misch got the response that he wanted. Pratt also told me he is not a person who would physically go after another person unless it was to protect himself or someone else.

Based upon what I have learned, I believe the facts are:

Max Misch saw a comment Shawn Pratt made to a Facebook post. This post was made by a person who has a strong dislike for Misch. This person "James Smith" wrote "Why is this man still allowed in JC's?? I guess they just don't care about their female patrons!! They should!!" Smith also posted two photographs of Misch at JC's.

The two comments made by Pratt did not specifically mention Misch, but were attached to a post about Misch. Those comments were "there is a lot of Complicit behavior going around Bennington" and "him being there doesn't surprise me".

The following day, Misch sent a message directly to Pratt. Misch made several comments to Pratt, which Misch himself referred to as racist. Some of these comments were: "alright pavement ape", "dumb nigger", "you old-ass muhfugguh", and "mahing'nintass, bruthuh".

Pratt responded to Misch, and stated "say that to my face when you see me I'm

INCIDENT UNDER INVESTIGATION
NO FURTHER DETAILS
AVAILABLE FOR RELEASE

always in your street". Pratt also called Misch "weak". Lastly Pratt wrote "see me face to face test your power lifting I'm old".

Both Misch and Pratt agree that neither of them had previously had any type of contact with each other, in person or through any other form of communication.

Misch saw and heard Pratt at 316 Gage Street yelling out words to the effect of "I see you walking your fucking dog" and "I'll see you on the street". An uninvolved female inside of 316 Gage Street heard the yelling and told me she heard this "angry fellow" yelling, "I see you walking motherfucker" and "I'll see you in the street". This female now has advised that she wants no future involvement in this incident and has stated she will not complete a written statement.

Pratt states he had become upset by Misch's words and while in the area of Misch's apartment, he did stop and yelled out words that he now regrets. Pratt states he did not specially drive to Misch's house, but was in the area for another reason.

This report is being forward to the Bennington County States Attorney's Office for their review.

Submitted by: D/Sgt. L. Cole

INCIDENT UNDER INVESTIGATION
NO FURTHER DETAILS
AVAILABLE FOR RELEASE

State v. Misch

DOCKET NO. 173-2-19 BNCR

Appendix B to Motion to Modify CORs

State v. Parker, 2018 WL 5920380 (VT 2018)

WESTLAW

2018 WL 5920380

Only the Westlaw citation is currently available.

VERMONT SUPREME COURT UNPUBLISHED ENTRY ORDER.

State v. Parker

Supreme Court of Vermont. November 9, 2018 Not Reported in All. Rptr. 2018 WL 5920380 (Approx. 2 pages)

STATE of Vermont

v.

Douglas PARKER *

SUPREME COURT DOCKET NO. 2018-352

November Term, 2018

11/9/2018

APPEALED FROM: Superior Court, Rutland Unit, Criminal Division, DOCKET NO. 1348-10-17 Rdcr

Present: SKOGLUND, J.

ENTRY ORDER

*1 In the above-entitled cause, the Clerk will enter:

Douglas Parker, defendant, appeals the trial court's denial of his motion to amend his conditions of release—specifically defendant asked the trial court to remove Condition # 13, which prohibits defendant from possessing firearms, so that he can hunt in the upcoming deer season. We affirm.

On October 9, 2017, defendant was arrested following an altercation at his home with B.H. and A.H., the two complaining witnesses. It is not disputed that, at some point, defendant removed his shotgun from his bedroom and assembled it on the kitchen table. However, defendant's account of the remainder of the evening's activities is distinctly different from B.H.'s and A.H.'s.

In defendant's sworn written statement, he asserts that around 9:30 PM, he retrieved his shotgun from his bedroom and assembled it on the kitchen table because he was planning on going bird hunting in the morning. After it was assembled, B.H. allegedly confronted defendant about having a gun in the house while B.H.'s four-month-old son and six-year-old daughter were in the house. In response, defendant asserts that he removed the gun from the kitchen to his truck outside, and, that is when the police arrived and arrested him.

In B.H.'s and A.H.'s sworn statements, they assert that defendant allegedly spent the evening drinking, becoming intoxicated, and threatening to kill himself. After he assembled his shotgun on the kitchen table, defendant went out to his car but left the gun in the kitchen. The complaining witnesses assert that B.H. went out to the truck to ask defendant to remove the gun from the house, to which defendant responded aggressively. Defendant allegedly returned to the home, retrieved the gun, opened the barrel of the gun as to load a round, and threatened to kill B.H. Defendant allegedly claimed to have four rounds on the stock of the gun and three or four rounds in the truck, and then took his gun out to his truck. At that point in time, the complaining witnesses claim they feared for their lives and their family and called the police.

Defendant was arraigned on October 10, 2017 and charged with first-degree aggravated domestic assault with a deadly weapon pursuant to 13 V.S.A. § 1043(a)(2). Based on the sworn statements submitted by the arresting state trooper, defendant, B.H., and A.H., the trial court did not find that defendant was at risk of failing to appear at future court hearings or of fleeing the area to avoid prosecution and therefore did not impose cash bail under 13 V.S.A. § 7554(a). The trial court went on to impose several conditions of release, including Condition # 13, which prohibits defendant from possessing any firearms.

On October 23, 2018, defendant moved to amend his conditions of release by striking Condition # 13. He argued that his counsel has made a reasonable effort to prepare the case for trial and has twice attempted to conduct the depositions of B.H. and A.H., but that this effort has been frustrated by the State because the scheduled depositions have been cancelled twice. And, because defendant is an avid hunter with no recent criminal involvement besides these charges, this delay has violated his Second Amendment rights to possess firearms.

*2 The trial court held a hearing on the motion and then issued an order denying defendant's request for amendment. The court began by noting that "the passage of time in and of itself does not mitigate concerns about [defendant]'s behavior for which probable cause has been found." Further, the trial court explained that conditions of release are designed and imposed to reasonably assure public safety, and while they are generally not intended to last for years, trial preparation occasionally takes an extended period of time and conditions should be in effect during the pendency of the case, unless there is no longer "a reasonable basis for continuing the conditions imposed." 13 V.S.A. § 7554(d)(2). The trial court explained that, although defendant vehemently disputes the charges and argues that there was no basis for the initial probable cause finding because he did not commit the alleged crime, that is for a jury to decide. The court concluded that Condition # 13 remained necessary to reasonably ensure public safety because defendant had not shown any difference in circumstances to mitigate the trial court's initial concerns expressed at defendant's arraignment over defendant's possession of a firearm—including defendant's alcohol use, suicidal ideation, and threats to others.

On appeal, defendant argues that the trial court erred when denying his request for amendment because Condition # 13 is not warranted by the circumstances of the alleged crime, nor is it the least restrictive condition of release necessary to ensure public safety.

This Court will affirm the trial court's decision if it "is supported by the proceedings below." 13 V.S.A. § 7556(c). We will only reverse where we find that the trial court abused its discretion. State v. Hoffman, 2007 VT 141, ¶ 5, 183 Vt. 547, 944 A.2d 912. Under § 7554(a)(2), the trial court is required to impose "the least restrictive combination of ... conditions that will reasonably ensure protection of the public." When determining what conditions to impose, the trial court must consider "the nature and circumstances of the offense charged, the weight of the evidence against the accused, [and] the accused's ... character and mental condition." 13 V.S.A. § 7554(b)(2). Further, "history of actual violence or threats of violence may be considered ... as bearing on the character and mental condition of the accused." Id. Once conditions are imposed, a defendant is entitled to have those conditions reviewed. 13 V.S.A. § 7554(d). And, upon that request, "[u]nless the conditions of release are amended as requested, the judge shall set forth in writing or orally on the record a reasonable basis for continuing the conditions imposed." Id.

Here, the trial court did just that. The trial court found that only differences between the current situation and the situation when Condition # 13 was initially imposed were (1) a year had passed and (2) the complaining witnesses were no longer residing at defendant's home. Nothing had changed to mitigate the reasonable concern it possessed about defendant possessing a firearm. Although he denied the charges, he was charged with the felony of first-degree aggravated domestic assault with a deadly weapon, based on allegations that he threatened to shoot the complaining witnesses and their children with his shotgun. Defendant brought forth no evidence to show that the trial court should no longer have concerns over defendant's alleged substance abuse or mental health, other than that defendant is an avid hunter, did not hunt last year as a result of Condition # 13, and wished to hunt in the upcoming deer season.

This Court cannot say that the trial court abused its discretion when outlining a reasonable basis for continuing the conditions imposed. Accordingly, we affirm.

All Citations

Not Reported in Atl. Rptr., 2018 WL 5920380

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